

Presentation on NAFTA

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I. NAFTA

(North American Free Trade Agreement)

- Approved by the House and Senate in October 1993
- President finalized the agreement December 9, 1993, effective January 1, 1994

Summary of NAFTA environmental provisions

The United States, Canada, and Mexico have committed in the NAFTA to implementing the agreement in a manner consistent with environmental protection and to promoting sustainable development.

Specific provisions throughout the Agreement build upon these commitments. For example:

- NAFTA assures that standards for food additives and contaminants are based on the best science available. Article 713.3 of NAFTA states that nothing shall be construed to prevent parties from adopting a sanitary or phytosanitary measure more stringent than the relevant international standard.
- The Agreement affirms the right of each country to maintain high health, safety, and environmental standards. It encourages NAFTA parties to harmonize their standards upward to strengthen environmental and health protection.
- The NAFTA clearly states that no country shall lower its health, safety, or environmental standards for the purpose of attracting investment.
- NAFTA preserves each country's right to enforce international treaty obligations, specifically concerning endangered species, ozone depleting substances, and hazardous wastes.
- The Agreement includes investment provisions which promote the development of more stringent environmental standards on new investments.
- Disputes may be settled through special NAFTA dispute settlement procedures. NAFTA dispute settlement panels may call on environmental experts to provide advice on factual questions related to the environment.
- In dispute settlement, the complaining country bears the burden of providing that another NAFTA country's environmental or health measure is inconsistent with NAFTA.

Goal: Strengthening the Development and Enforcement of Environmental Laws and Regulations

- Health, Safety, Environmental and Consumer Measures (Chapter 9)
- Sanitary and Phytosanitary Measures (Chapter 7)

Health, Safety, Environmental and Consumer Measures (Chapter 9)

- recognizes relationship between environmental issues and trade
- promotes environmentally sustainable economic development
- assures that no party create or maintain an unfair trade advantage over another party by
“overprotection” or “underprotection” of the environment in its national environmental laws and regulations or in the administration or enforcement of them
- gives preference to international standards, but explicitly allows measures resulting in a higher level of health, safety, and consumer protection
- creates a new Free Trade Commission to resolve disputes
- allows different geographical conditions to be considered, where appropriate, e.g., Great Lakes Basin

Sanitary and Phytosanitary (SPS) Measures (Chapter 7)

- SPS measures generally refer to the measure that protects against the spread of a pest or from risks arising from a food additive or contaminant
- NAFTA assures that standards for SPS are based on the best science available

Deficiencies in the 1992 Free Trade Agreement’s Environmental Provisions

- many groups, in all three countries, expressed dissatisfaction concerning the stringency and enforcement of the environmental and labor laws in the three countries
- in response, the parties undertook negotiations of side-agreements

II. North American Agreement on Environmental Cooperation (NAAEC) Effective January 1, 1994

Summary of Environmental Provisions

The NAFTA partners commit themselves to undertake important environmental policies regarding the development, implementation, and enforcement of environmental laws. The supplemental agreement helps insure that:

- The agreement will not affect the rights of states and provinces to maintain standards at levels higher than the federal governments. All states and provinces may enact more stringent environmental measures.
- No nation will lower domestic environmental standards, only raise them. Enforcement of domestic environmental laws will be continually strengthened.
- Border clean-up and infrastructure development will be accelerated. Cooperative efforts between countries will increase to better conserve and protect the environment.
- Countries will be obligated to report on the state of their environments, and to promote environmental education and scientific research. The partners support increased public participation in the development of environmental policy, and support greater transparency of governmental procedures.
- The partners will work toward limiting trade in toxic substances that they have banned domestically.
- A comprehensive mechanism for dispute settlements, sanctions, and penalties against governments failing to enforce environmental laws will be established. A Joint Commission on Environmental Cooperation has been created to evaluate and settle disputes.

Increased public rights to know. (Article 4 of NAAEC)

- provides for increased public participation in the development of environmental policies in the three countries and greater transparency of government procedures
- each party must provide a comment period for any proposed environmental measure
- each party must promptly publish and make available its laws, regulations, procedures, and administrative rulings

The Joint Commission for Environmental Cooperation (CEC) (Article 8-13 of NAAEC)

Structure - The three countries' top environmental officials will comprise the Commission's Council.

A Joint Advisory Committee made up of non-governmental organizations will advise the Council in its deliberations. The heart of the Commission is its Secretariat, which will take broad direction from the Council, and will be largely independent. (Which is also empowered to consider a submission from any NGO or person asserting that a party is failing to effectively enforce its environmental laws.)

CEC Mission Statement

- The CEC facilitates cooperation and public participation to foster conservation, protection, and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links between Canada, Mexico, and the United States.

Function - The Commission was developed to promote and facilitate cooperation among the Parties with respect to environmental matters. It also will address questions and disputes that may arise between the Parties regarding the interpretation or application of the NAFTA. Specifically, the Commission will:

- Evaluate the environmental implications of process and production methods. It will promote the exchange of information on criteria and methodologies used in establishing domestic standards.
- Promote greater public access to information about hazardous substances, and foster public discussion on environmental concerns.
- Assess trans-boundary environmental problems and promote an integrated North American approach to the environment.
- The Commission will act on submitted concerns relating to environmental issues. It will develop fact-finding reports, and has the power to refer Parties which persistently fail to enforce environmental laws to a dispute settlement panel.
- The dispute settlement process provides, in the end, for sanctions if countries have failed to correct problems of non-enforcement.

Sanctions and Penalties (Articles 34 and 26, and Annexes 34, 36A, 36B and 41 of NAAEC)

- through the dispute settlement procedure, (under part 5 of NAAEC), sanctions may be assessed against Parties that have persistently failed to enforce their environmental laws
- for the U.S. and Mexico, these sanctions would be either in the form of punitive trade tariffs or fines; for Canada, they would be in the form of monetary penalties alone.
- Annex 36A establishes a separate set of enforcement procedures for cases in which Canada is the Party complained against.

- pursuant to the Annex, monetary enforcement penalties could be assigned against Canada, but the procedures for “suspension of benefits” do not apply to complaints against Canada.

III. General Agreement on Tariffs and Trade (GATT)

- Uruguay Round, concluded December 15, 1993, by 117 countries
- The agreement resulting from the Uruguay Round successfully established the World Trade Organization (WTO), reduced tariffs on many industrial products, and imposed limits on agricultural subsidies, but failed to create specific provisions addressing environmental issues.

Principles and Environmental Provisions of GATT

- Premise: that like-minded nations, with a shared interest in liberal trade and market economies, can better achieve those goals by acting together

Environmental Provisions of GATT, Uruguay Round

- the preamble commits members to protect and preserve the environment in accordance with the objective of sustainable development. Final Act, Part II., preamble.
- like NAFTA, GATT also contains provisions for greater transparency of dispute settlement processes and for facilitating public participation in preparations for disputes
- it provides certain exemptions from restrictions on the use of subsidies for certain types of government assistance to pay existing facilities to meet higher environmental standards
- the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures is the primary portion of GATT that addresses environmental issues

Comparison of NAFTA and GATT

- basic rights and obligations
- harmonization of international standards
- equivalence of international standards
- risk assessment
- technical assistance
- administration - committee on SPS measures
- dispute settlement provisions concerning environmental protection
- burden of proof issues

Basic Rights and Obligations

- both enable each country to establish its own appropriate level of environmental and health protection based on scientific principles and acceptable level of risk
- GATT's language is more restrictive than NAFTA's in determining the extent to which nations may maintain levels of protection above international standards, with NAFTA's language more clearly allowing freedom to maintain higher than average standards
- both NAFTA and GATT forbid countries from adopting standards that are disguised restrictions on international trade

Harmonization of International Standards

- both NAFTA and GATT promote the international standards, but NAFTA more directly encourages the concept of “upward harmonization” of health and safety standards
- unlike GATT, NAFTA requires that nations adopting international standards do so “without reducing the level of protection of human, animal, or plant life or health....”
- GATT does allow parties to maintain “higher than international standards”, but they must be scientifically justified, which could result in backsliding in the stringency of environmental standards

Equivalence of International Standards

- both require importing members to accept the SPS measures of exporting parties as equivalent as long as the exporting party can prove objectively that its measure achieves the importing member’s appropriate level of protection.
- unlike GATT, NAFTA denounces any downward harmonization of standards.
- NAFTA allows importers to determine that exporters meet their standards, whereas GATT allows exporting members to request explanations regarding the basis of the importer’s standards.

Risk Assessment

- both NAFTA and GATT risk assessment procedures are similar, assuring that SPS measures are based on assessments of risks to human, animal, or plant life or health.
- they also require economic as well as scientific factors to be taken into account

Technical Assistance

- GATT facilitates the provision of technical advice. Assistance and information to other members with the objective of enhancing the overall level of sanitary and phytosanitary protection among all members.
- this assistance includes research, processing technologies, infrastructure, and the establishment of national regulatory bodies

Administration - Committee on SPS Measures

- GATT creates a committee on Sanitary and Phytosanitary Measures with similar duties and responsibilities as that under NAFTA.
- The committee facilitates the harmonization of international standards, maintain contact with international organizations in the field of SPS protection, facilitate technical cooperation between the parties and monitor progress in international harmonization and the use of international standards.
- Also, the committee must compile a list of international standards relating to SPS measures so that exporters can conform to those standards and access those markets.

Dispute Settlement Provisions Concerning Environmental Protection

- The basic structure between NAFTA and GATT is very similar.
- Both establish a large overseeing commission in charge of settling disputes, GATT-Dispute Settlement Body, NAFTA- Free Trade Commission; both receive assistance from a secretariat who then has control over the establishment of panels.
- GATT does not contain any specific provisions for handling disputes over the environment or conservation, but NAFTA's Side Agreement does establish these procedures.

Burden of Proof Issues

- The provisions of the Uruguay Round of GATT and NAFTA contain significant differences in the complaining party's burden of proof required in bringing disputes concerning environmental and health issues.
- NAFTA places the burden of proof on the complaining party; GATT, however places the burden of proof on the party complained against when considering SPS measures.

NAFTA or other U.S. International Obligations: Which will prevail?

- NAFTA appears to protect international environmental agreements.
- The trade obligations of the NAFTA countries under specified environmental agreements regarding endangered species, ozone-depleting substances and hazardous wastes will take precedence over NAFTA provisions, subject to a requirement to minimize inconsistency with NAFTA.

GATT or NAFTA, which will prevail?

- If a dispute could be brought under both NAFTA and GATT, the complaining party may generally choose either forum to pursue settlement; however, there are two major exceptions to this rule.
- NAFTA, being a trilateral agreement, includes special provisions for three-sided disputes not considered in the CFTA or the GATT; therefore, the complaining party must first consult the third party before pursuing resolution through a GATT mechanism that blocks third party involvement.
- If a dispute arises and the responding party claims that its action is subject to Article 104 of NAFTA and formally requests that the matter be considered under NAFTA, the complaining party cannot bring the matter before a GATT panel.

IV. Cases

A. GATT / WTO

United States-Restrictions on Imports of Tuna case, GATT Doc. DS21/R (1991)

- The Earth Island Institute took the U.S. to court for failing to enforce the Marine Mammal Protection Act, and a federal judge ordered an embargo against Mexican tuna.
- On January 25, 1991, Mexico brought the trade dispute to a preliminary GATT panel, which found that the U.S. embargo was a “unilateral protectionist trade measure” that violated the international commerce pact.
- The panel ruling was never adopted because Mexico and the U.S. opted to settle the dispute quickly and quietly to avoid jeopardizing the success of NAFTA trade negotiations.
- The tuna-dolphin ruling caused the United States to demand the right to maintain high domestic environmental standards when negotiating NAFTA.
- Also, had this case appeared several years later under NAFTA, a very different outcome would have been likely.
- Before bringing the matter before a dispute settlement mechanism, Mexico would have been required to consult with Canada, giving Canada the option to join Mexico as a second complaining party under the NAFTA procedures.
- Even if Canada yielded its right to participate, the U.S., as the responding party, would still have the right to request that the dispute be handled through NAFTA.
- If the U.S. did request that it be handled under NAFTA, they would claim that the Marine Mammal Protection Act (MMPA) was a right under NAFTA to adopt a standards related measure to pursue the legitimate protection of animal life.
- After consultations with experts, it is unlikely that the NAFTA panel would have found the MMPA inconsistent with NAFTA objectives.

Shrimp/Turtle Case (1998)

- The United States Endangered Species Act requires that all shrimp trawlers install turtle exclusion devices in their nets, so they will not catch and drown endangered sea turtles.
- To protect its shrimpers from cheaper imports caught without using the turtle exclusion devices, the U.S. forbids imports from countries that do not have similar laws.
- India, Pakistan, and Thailand challenged that ban in the WTO, which ruled that the U.S. measure violates free trade rules.
- In dicta, the WTO panel stated:

"We wish to underscore what we have not decided in this case. We have not decided that the protection and preservation of the environment is of no significance to Members of the WTO. Clearly it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles.

Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do."

B. NAFTA

Ethyl Corp. v. Government of Canada

- The Canadian Parliament acted to ban the import and interprovincial transport of the gas additive MMT, which it considers to be a dangerous toxin.
- Ethyl Corp. filed a lawsuit against the Canadian government under NAFTA, and sought \$251 million in damages.
- The Canadian government paid Ethyl Corp. \$13 million in damages and legal fees.

Canada revoked PCB ban to avoid NAFTA Challenge

- In 1995 Canada banned the export of PCB waste, but revoked the ban in 1997 after U.S. companies threatened to challenge them under NAFTA.
- S.D. Myers, an Ohio based company specializing in the clean-up of hazardous wastes, is asking for \$6.3 million from the Canadian government for lost profits during the 15-month ban.

Methanex

- Methanex Corp., a Canadian Corporation, filed against the U.S. government under NAFTA to attack California's executive order phasing out the use of MTBE.
- Methanex seeks nearly \$970 million in damages.
- Also Methanex has filed a complaint under article 14 of the Side Agreement, claiming that the U.S. failed in its environmental obligations, allowing the storage tanks to leak, and therefore pollute groundwater with MTBE.

Loewen

- The U.S. is being sued by Loewen Group, a private Canadian corporation for cash damages, totaling hundreds of millions, under the "investor to state" provisions of NAFTA.
- Loewen, a large, Canadian-based funeral conglomerate, was the defendant in a 1995 Mississippi lawsuit filed by local Mississippi funeral and insurance companies. They accused Loewen of breach of contract and anti-competitive and state anti-trust violations. A local jury awarded approximately \$500 million in damages to the plaintiffs.
- Loewen appealed to the Supreme Court of Mississippi claiming that it be exempted from a law requiring that the defendants who wish to pursue an appeal without beginning to pay damages, post a bond of 125% of the damaged owed.
- Loewen settled the case for \$150 million, but is now claiming that the Mississippi state court award constituted a violation of its investor rights and protections granted by NAFTA.

Hypothetical Case - Parliamentary Chicken...in quest of new colonies for its empire.

C. Side Agreement - CEC

Hudson River Audubon Society of Westchester, Inc. Save Our Sanctuary Committee

- alleges that the National Park Service is failing to enforce and proposing to violate the Migratory Bird Treaty Act and the Endangered Species Act by proposing to construct a paved, multi-purpose bicycle path through the Jamaica Bay Wildlife Refuge in Queens, NY, which they claim will destroy critical habitat for endangered and threatened species.
- they claim that an alternative path was proposed outside the boundary of the refuge which was approved by the Department of Transportation but denied by the National Park Service.

Neste Canada, Inc.

- alleges that the state of California is not enforcing its environmental laws relating to underground storage tanks, resulting in widespread soil, water, and air pollution.
- Neste claims to support Methanex's research and investigations, and believes that there are harmful components in gasoline, but the additive MTBE is not one of them.
- they believe that the removal of MTBE from gasoline will not, in itself cause less gasoline to leak into the environment, but it will make detection of leaks more difficult.

Rosa Maria Escalante de Fernandez

- asserts that the town of Cumpas, Sonora, Mexico has been adversely affected by air pollution from the Molymex plant, and that the inhabitants of Cumpas and the non-governmental organization of which she is a member have repeatedly requested the closure or relocation of the plant because they believe it causes adverse effects on the environment, increases mortality rates, and damages crops.

V. Differences among U.S., Canada, and Mexico - Comparative Law and Enforcement Issues

- in the existence, stringency and enforcement of environmental emission standards
- in the amount, quality, and legal authority to obtain environmental data
- in governmental data gathering, regulatory enforcement infrastructure
- in access to legal remedies in the court systems of each country

U.S. is the leader

- the U. S. has many more, and far more complicated environmental laws and regulations than either Canada or Mexico
- the U.S. federal and state governments have much larger agencies devoted to writing and enforcing environmental regulations

Regulating Entities

- In imposing environmental emission limitations, both Canada and Mexico do not distinguish between new and existing sources of pollution.
- Many major environmental disputes between governments and regulated entities in the U.S. are resolved through civil judicial lawsuits, which is not possible in Canada or Mexico.

Inspections and Qualified Inspectors

- Canada and Mexico both have fewer environmental compliance inspectors than the United States

VI. Specific Differences between U.S. and Canadian environmental standard setting and enforcement

- The provinces have primary responsibility for environmental protection and enforcement, rather than a universal Federal authority as in the U.S.
- The only provincial Canadian mechanism for obtaining a penalty is through a “quasi-criminal” proceeding, because the Canadian Constitution reserves the criminal power to the federal government, but still cannot impose imprisonment greater than one year.
- On the other hand, the U.S. has many mechanisms for obtaining penalties, both at the state and federal levels, such as judicial and administrative penalties.
- The greatest administrative power that the Ministry for the Environment has in Ontario is the ability to issue Control or Stop Orders for injunctive relief, but these are issued only to persons responsible for the adverse affect(s) to the environment, not corporations.
- In Canada, there is a very high standard of proof required for a quasi-criminal proceeding equivalent to the U.S. “beyond a reasonable doubt” criteria, which means that important environmental violations cannot be effectively penalized with such a high standard of proof. The U.S. standard to prove civil or administrative environmental violations is a “preponderance of the evidence”.
- In Canada, environmental cases under the Provincial Offenses Act, are usually brought before Justices of the Peace, many of whom are neither educated in the law nor have technical degrees.
- The enforcement system in Canada is based on a “standard of liability”, whereas the United States’ system is based on a “strict liability” standard; thereby allowing Canadian facilities to meet the standard by making reasonable efforts to comply.
- Although criminal Canadian environmental laws provide for penalties of up to \$200,000 per day of violation, it is unusual to see penalties greater than a few thousand dollars. Most U.S. environmental laws have limits of \$25,000 per day per violation.
- In Canada, more enforcement actions are against individuals and small businesses, rather than major corporations, as in the U.S.
- Most of Canada’s environmental laws, both federal and provincial, are drafted very broadly to give the Canadian Ministry of Environment or Province broad discretion in implementing them.

